No. 89-7370 (6)

In the Supreme Court of the United States

OCTOBER TERM, 1990

MOSHE GOZLON-PERETZ, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES

KENNETH W. STARR
Solicitor General
ROBERT S. MUELLER, III
Acting Assistant Attorney General
WILLIAM C. BRYSON
Deputy Solicitor General
AMY L. WAX
Assistant to the Solicitor General
RICHARD A. FRIEDMAN
Attorney

Department of Justice
Washington, D.C. 20530
(202) 514-2217

35pp

QUESTION PRESENTED

Whether the mandatory minimum terms of supervised release required by the Anti-Drug Abuse Act of 1986 became effective for offenses committed on or after the date of enactment, October 27, 1986.

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OPINION BELOW

The opinion of the court of appeals deciding the question presented (J.A. 43-53) is reported at 894 F.2d 1402; the court of appeals' opinion upholding petitioner's conviction (J.A. 19-42) is reported at 865 F.2d 551.

JURISDICTION

The judgment of the court of appeals was entered on January 25, 1990. The petition for a writ of certiorari was filed on April 25, 1990, and granted on June 18, 1990. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

Section 1002 of the Anti-Drug Abuse Act of 1986, Pub. L. No. 99-570, 100 Stat. 3207-3 to 3207-4, provides as follows:

> Section 401(b)(1) of the Controlled Substances Act (21 U.S.C. 841(b)(1)) is amended –
>
> (1) by redesignating subparagraph (C) as subparagraph (D); and
>
> (2) by striking out subparagraphs (A) and (B) and inserting the following in lieu thereof:
>
> "(1)(A) In the case of a violation of subsection (a) of this section involving –
>
> "(i) 1 kilogram or more of a mixture or substance containing a detectable amount of heroin;
>
> * * * * *
>
> such person shall be sentenced to a term of imprisonment which may not be less than 10 years or more than life * * *, a fine not to exceed the greater of that authorized in accordance with the provisions of title 18, United States Code or $4,000,000 if the defendant is an individual * * *, or both. * * * Any sentence under this subparagraph shall * * * impose a term of supervised release of at least 5 years in addition to such term of imprisonment * * *. Notwithstanding any other provision of law, the court shall not place on probation or suspend the sentence of any person sentenced under this subparagraph. No person sentenced under this subparagraph shall be eligible for parole during the term of imprisonment imposed therein.
>
> "(B) In the case of a violation of subsection (a) of this section involving –

> "(i) 100 grams or more of a mixture or substance containing a detectable amount of heroin;
>
> * * * * *
>
> such person shall be sentenced to a term of imprisonment which may not be less than 5 years and not more than 40 years * * *, a fine not to exceed the greater of that authorized in accordance with the provisions of Title 18, United States Code, or $2,000,000 if the defendant is an individual * * *, or both. * * * Any sentence imposed under this subparagraph shall * * * include a term of supervised release of at least 4 years in addition to such term of imprisonment * * *. Notwithstanding any other provision of law, the court shall not place on probation or suspend the sentence of any person sentenced under this subparagraph. No person sentenced under this subparagraph shall be eligible for parole during the term of imprisonment imposed therein.

Section 1004 of the Anti-Drug Abuse Act of 1986, 100 Stat. 3207-6, as follows:

> (a) The Controlled Substances Act and the Controlled Substances Import and Export Act are amended by striking out "special parole term" each place it appears and inserting "term of supervised release" in lieu thereof.
>
> (b) The amendments made by this section shall take effect on the date of the taking effect of section 3583 of title 18, United States Code.

STATEMENT

1. After a jury trial in the United States District Court for the District of New Jersey, petitioner was convicted of

conspiring to distribute more than one kilogram of heroin, in violation of 21 U.S.C. 846 (Count 1); distributing approximately 240 grams of heroin, in violation of 21 U.S.C. 841(a)(1) (Count 2); and possessing more than one kilogram of heroin with intent to distribute it, in violation of 21 U.S.C. 841(a)(1) (Count 3). He was initially sentenced to concurrent terms of 20 years' imprisonment on Count 1; 15 years' imprisonment and a five-year term of special parole on Count 2; and 15 years' imprisonment and a five-year term of special parole on Count 3. He was also fined $200,000. J.A. 18.

The facts of petitioner's offenses are described in the court of appeals' opinion in *United States* v. *Levy*, 865 F.2d 551, 552-556 (3d Cir. 1989) (en banc). J.A. 23-28. In February 1987, petitioner conspired with his co-defendants Levy and Yehuda to sell heroin to an undercover DEA agent. The three defendants were arrested at the Sands Hotel in Atlantic City, New Jersey, after they agreed to sell approximately 250 grams of heroin to the undercover agent. More than two kilograms of heroin was subsequently discovered in a room that Yehuda had rented in the hotel. J.A. 27-28.

2. The court of appeals affirmed petitioner's convictions but ordered the district court to redesignate petitioner's five-year term of post-confinement monitoring as "supervised release" rather than "special parole." J.A. 53. The court rejected petitioner's argument that the post-confinement monitoring provisions of the Anti-Drug Abuse Act of 1986 (1986 Act) did not become effective until November 1, 1987, and thus that he is not subject to any form of post-confinement monitoring. J.A. 47-50.

The 1986 Act provided for a mandatory term of "supervised release" to be imposed following a term of imprisonment for a variety of serious drug offenses. See Pub. L. No. 99-570, Tit. I, §§ 1002, 1102, 1104, 1302, 1866.

Although the 1986 Act did not expressly set forth the date on which the new penalty provisions would become effective, the court of appeals applied the well-established principle that absent some provision to the contrary, a statute is deemed to be effective on the date of its enactment. Accordingly, the court held that the penalty provisions of the 1986 Act, including the portions governing post-confinement monitoring, became effective on the date of enactment, October 27, 1986, and therefore applied to petitioner's offenses, which occurred in February 1987. J.A. 43-53.

INTRODUCTION AND SUMMARY OF ARGUMENT

This case ushers the Court into the intricacies of the federal controlled substances statutes, a body of law that Congress has frequently revisited and modified. The case arises out of one such modification, and the emergence of a new concept in federal law, that of "supervised release."

The penalties originally imposed in 1970 by the Controlled Substances Act, Pub. L. No. 91-513, Tit. II, 84 Stat. 1242, included a term of "special parole" for certain serious drug offenses. The special parole term would commence at the end of the defendant's entire term of imprisonment, even if the defendant served a portion of that term on "ordinary" parole. See 18 U.S.C. 4205, 4208 (1982); 21 U.S.C. 841(c) (1982). Revocation of special parole would result in a new term of imprisonment for the entire special parole term, with no credit for the time the defendant had spent on special parole. The defendant could be reparoled, however, prior to the end of the new term of imprisonment. 21 U.S.C. 841(c) (1982).

In 1984, as part of the Comprehensive Crime Control Act of 1984, Pub. L. No. 98-473, Tit. II, ch. V, 98 Stat. 2068, Congress created a new penalty provision for large-

scale drug offenses. The new provision, 21 U.S.C. 841(b)(1)(A) (Supp. II 1984), raised the maximum term of imprisonment for a first offense from 15 to 20 years for certain large-scale drug offenses, including offenses involving 100 grams or more of heroin. For reasons that are unclear, the new provision did not contain any reference to special parole. This unexplained omission was odd, since special parole remained a part of all the sentencing provisions for serious crimes that were carried over from prior law. As of 1984, then, the statute required imposition of special parole terms for most drug offenses, but not for the least serious or the most serious.

Something else occurred in 1984. As part of a wholesale revision of the federal sentencing system, the 1984 Act prospectively abolished both ordinary and special parole and created a new type of post-confinement monitoring called "supervised release." The change-over to the new sentencing system was scheduled to take place on November 1, 1987. Under supervised release, the court rather than the Parole Commission would oversee the defendant's post-confinement monitoring (although the actual monitoring would still be performed by probation officers). See 18 U.S.C. 3583, 3601 (Supp. II 1984). The new statute authorized courts to alter the conditions, or terminate or extend the term of supervised release prior to its expiration. 18 U.S.C. 3583(e) (Supp. II 1984). In the event of a violation of the supervised release order, the statute authorized a court to hold the defendant in contempt of court. 18 U.S.C. 3583(e)(3) (Supp. II 1984).

In 1986, Congress once again amended the controlled substances statutes and comprehensively revised and enhanced the penalties for drug offenses. See Anti-Drug Abuse Act of 1986, Pub. L. No. 99-570, Tit. I, §§ 1001 *et seq.*, 100 Stat. 3207-2. In Section 1002 of the 1986 Act, Congress created a new drug penalty for especially large-

scale offenses, such as offenses involving one kilogram or more of heroin. For such high-volume offenses, Congress authorized a sentence of at least ten years and up to life imprisonment. 21 U.S.C. 841(b)(1)(A) (Supp. IV 1986). For violations involving between 100 grams and one kilogram of heroin, Congress authorized a sentence of between five and 40 years' imprisonment. 21 U.S.C. 841(b)(1)(B) (Supp. IV 1986). In both situations, Congress required the court to impose a term of supervised release. The supervised release term was to be at least five years for offenses governed by Section 841(b)(1)(A), and at least four years for offenses governed by Section 841(b)(1)(B). For other offenses involving Schedule I and II controlled substances (see 21 U.S.C. 812), the statute contained no mandatory minimum term of imprisonment (unless the offense resulted in serious injury or death), but provided for a maximum of 20 years' imprisonment. In addition, any term of imprisonment for such offenses had to be accompanied by at least a three-year term of supervised release. 21 U.S.C. 841(b)(1)(C) (Supp. IV 1986). The final subsections, 21 U.S.C. 841(b)(1)(D), (b)(2), and (b)(3) (Supp. IV 1986), carried forward the provisions of prior law largely unchanged as to imprisonment and post-confinement monitoring. Subsection (b)(1)(D) provided that offenses involving marijuana and hashish (except in the huge quantities governed by Section 841(b)(1)(A) and (B)) continued to be subject to a maximum of five years' imprisonment, and it continued to provide that any term of imprisonment had to be accompanied by at least a two-year term of special parole. Subsections (b)(2) and (b)(3) continued to provide that offenses involving Schedule IV and V controlled substances were subject to a maximum of three years' and one year's imprisonment, respectively. A term of imprisonment imposed under subsection (b)(2) was to be accompanied by at least a one-year special parole term.

Subsection (b)(3) contained no provision for special parole.[1]

The 1986 Act plugged the "gap" in post-confinement monitoring for serious drug offenders that the 1984 statute had created. It accomplished that goal by extending supervised release to all serious drug offenses, including those that under the 1984 statute would not have been subject to any post-confinement monitoring.

Petitioner argues that the 1986 Act should be read to postpone the requirement of any form of post-confinement monitoring for serious drug offenses for more than a year, until the date the new federal sentencing system was to go into effect, November 1, 1987. But the text of the 1986 Act nowhere indicates that the effective date of the Act's penalty provisions was to be postponed, and nothing in the legislative history suggests that Congress meant to delay the effectiveness of the new drug penalties or extend the gap in post-confinement monitoring for another year. It is therefore not difficult to dismiss petitioner's claim that the 1986 Act should be interpreted to postpone the effective date of the new penalty sections as a whole or to provide for no form of post-confinement monitoring for large-scale drug offenders until November 1, 1987.

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[1] In addition to changing the penalty provisions, the 1986 Act modified the provision governing the operation of supervised release. Instead of continuing to rely on contempt of court as a sanction for violation of supervised release orders, Congress established a scheme of revocation patterned after the revocation provision applicable to special parole. Under the new revocation provision, the term of supervised release could be revoked and the defendant required to serve in prison all or part of the supervised release term, with no credit for the time the defendant had spent on supervised release. 18 U.S.C. 3583(e)(4) (Supp. IV 1986).

A more difficult question is whether the form of post-confinement monitoring that Congress intended for the period between October 27, 1986, and November 1, 1987, was supervised release or special parole. That question arises because of a last-minute change that was made in the bill that became the 1986 Act. That change substituted the term "supervised release" for "special parole" in several key sections of the bill. Before that change was made, the bill had designated special parole, rather than supervised release, as the interim form of post-confinement monitoring for serious drug offenders who committed crimes between October 27, 1986, and November 1, 1987. The last-minute change indicated an apparent intention to initiate the regime of supervised release immediately, rather than postponing it for a year. Yet the drafters did not do a particularly careful job of effecting that change. In particular, they failed to eliminate the references to special parole that remained in the unamended provisions of the controlled substances statutes, and they failed to make the definitional provision for supervised release (18 U.S.C. 3583) effective immediately. As a result, there has been confusion as to which form of post-confinement monitoring was in effect during the interim period.

Complete internal consistency within the controlled substances statutes would require the last-minute change in the bill to be disregarded and the term "supervised release" to be read as if it had been left as "special parole." That reading would make it clear that special parole would be the form of post-confinement monitoring for all serious drug offenses committed between October 27, 1986, and November 1, 1987. Because, after 1986, the differences between special parole and supervised release were minor, any such judicially crafted amendment of the language of the statute would have no significant practical impact. But that course would be unfaithful to what Congress actually

did: Congress specifically designated supervised release as the appropriate form of post-confinement monitoring for defendants such as petitioner. Because the incongruities in the statute created by the institution of supervised release as of October 27, 1986, do not render the statutory scheme absurd or unworkable, the Court should take Congress at its word. The Court should hold, as the court of appeals concluded, that persons in petitioner's position are subject to terms of supervised release beginning at the conclusion of their terms of imprisonment.

ARGUMENT

THE MANDATORY MINIMUM TERMS OF SUPERVISED RELEASE REQUIRED BY THE ANTI-DRUG ABUSE ACT OF 1986 APPLY TO OFFENSES COMMITTED ON OR AFTER THE DATE OF ENACTMENT, OCTOBER 27, 1986

Section 1002 of the Anti-Drug Abuse Act of 1986 established mandatory terms of imprisonment for large-scale drug offenses such as the ones of which petitioner was convicted. In addition, it provided that any person convicted of such an offense would be subject to a mandatory term of supervised release—at least five years if the offense involved a kilogram or more of a mixture containing heroin, and at least four years if the offense involved 100 grams or more of a mixture containing heroin. See 21 U.S.C. 841(b)(1)(A) and (B) (Supp. IV 1986). Neither Section 1002 nor any other provision of the 1986 Act expressly set forth the date on which that Section would become effective.

It is well settled that in the absence of an express provision to the contrary, "an act takes effect on the date of its enactment." *United States* v. *York*, 830 F.2d 885, 892 (8th Cir. 1987), cert. denied, 484 U.S. 1074 (1988); see *Arnold* v. *United States*, 13 U.S. (9 Cranch) 104, 119-120 (1815); *Matthews* v. *Zane*, 20 U.S. (7 Wheat.) 164, 210-211

(1822); *United States* v. *Stillwell*, 854 F.2d 1045, 1047 (7th Cir.), cert. denied, 488 U.S. 973 (1988); *United States* v. *Shaffer*, 789 F.2d 682, 686 (9th Cir. 1986); 2 N. Singer, *Sutherland Statutory Construction* § 33.06 at 12 (C. Sands 4th ed. 1986). In reliance on that rule, Congress typically omits an effective date provision from a statute unless it wishes the date of effectiveness to be postponed. Because no provision delayed the effective date of Section 1002, the supervised release provisions of that statute applied to petitioner's offense. The court of appeals was therefore correct in directing the district court to impose a term of supervised release on petitioner.

In our view, the simple propositions set forth in the foregoing two paragraphs answer this case. The whole of petitioner's brief is, in essence, an effort to avoid the force of this straightforward application of statutory language and basic principles of statutory construction. We devote the remainder of our brief to rebutting those efforts. But in spite of the complexity introduced by reference to a host of statutory provisions that underwent biennial revision between 1984 and 1988, the heart of the case remains simple: on October 27, 1986, the President signed a bill that contained a provision requiring a term of supervised release for persons in petitioner's position; nothing in the bill delayed the effective date of the provision that imposed that requirement; the provision, including the mandatory term of supervised release, therefore became effective on the date the President signed the bill and made it law.

A. Congress Did Not Postpone All The Penalty Provisions In Section 1002 Of The 1986 Act

Petitioner begins with a bold stroke. He argues (Br. 24-28) that Congress intended to postpone *all* the penalty provisions of Section 1002 of the 1986 Act—not just the

supervised release provisions—until November 1, 1987, more than a year after they were signed into law. That argument is plainly wrong. It conflicts with the language of the statute, it finds no support in the legislative history, and it has been rejected by every court that has considered it.[2]

First, there is nothing in Section 1002 or any other section of the 1986 Act that suggests that the penalty provisions of Section 1002 were to have a delayed effective date. The 1986 Act expressly delayed the effective date of several of the Act's other provisions (Sections 1004(a), 1006(a), 1007(a), and 1009(a)), so the failure to prescribe a delayed effective date for Section 1002 is particularly telling. See *General Motors Corp.* v. *United States*, 110 S. Ct. 2528, 2532 (1990) (inappropriate to assume a time limitation in a silent statutory provision when "the very next provision of the Act contains just such an express time restraint"); *Russello* v. *United States*, 464 U.S. 16, 23 (1983) ("[W]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion."). The language of Section 1002 expressed the will of Congress to increase sentences for serious drug offenders, and nothing in the text of the statute indicates that Congress wished to supplement the new regime only after a year's delay.

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[2] See, *e.g.*, *United States* v. *Duprey*, 895 F.2d 303, 311 (7th Cir. 1989), cert. denied, 110 S. Ct. 1927 (1990); *United States* v. *Garcia*, 879 F.2d 803, 804 (10th Cir. 1989); *United States* v. *Charleus*, 871 F.2d 265, 269 (2d Cir. 1989); *United States* v. *Padilla*, 869 F.2d 372, 381-382 (8th Cir.), cert. denied, 109 S. Ct. 3223 (1989); *United States* v. *Levy*, 865 F.2d 551, 559 n.4 (3d Cir. 1989); *United States* v. *Meyers*, 847 F.2d 1408, 1415 (9th Cir. 1988).

The legislative history likewise provides no support for the "one year delay" hypothesis. The new drug penalties were enacted in an atmosphere of urgency, to provide for "increased, stiff penalties for most drug related offenses." 132 Cong. Rec. 26,473 (1986) (section-by-section analysis of Senate bill, S. 2878, 99th Cong., 2d Sess. (1986)). When last-minute conflicts developed over other aspects of the proposed bill, the legislators urged compromise so that the legislation would not be delayed until the next congressional session. See 132 Cong Rec. S15,934 (daily ed. Oct. 10, 1986) (remarks of Sen. Chiles and Sen. Dole); 132 Cong. Rec. 31,407 (1986) (remarks of Sen. Dole); 132 Cong. Rec. 32,717 (1986) (remarks of Rep. Pepper). It is impossible to infer from legislators' comments in the course of considering the 1986 Act—which unmistakably reveal the crisis atmosphere surrounding the enactment of the bill—that Congress meant to put off the effective date of the 1986 Act's penalty scheme for more than a year.

Petitioner's argument rests entirely on the supposed anomaly created by the immediate imposition of mandatory minimum terms of imprisonment by Section 1002 and the postponement of the changes made by Sections 1007(a) and 1009(a) of the 1986 Act. The latter provisions authorized sentencing below the mandatory minimum for certain offenders who cooperated with the government. See Pub. L. No. 99-570, Tit. I, §§ 1007(b), 1009(b). Petitioner argues that if Section 1002 became effective upon enactment, there would be no possibility of sentences below the mandatory minimum for offenses committed during the one-year period between October 27, 1986, and November 1, 1987.

There is no such anomaly. Congress recognized this potential problem and fixed it. In December 1987, Congress enacted corrective legislation that ensured that the provisions permitting departures from mandatory mini-

mum sentences in the case of cooperating defendants would apply to offenses committed before the effective date of the sentencing guidelines, November 1, 1987. See Sentencing Act of 1987, Pub. L. No. 100-182, § 24, 101 Stat. 1271.[3] Not only does that legislation undermine petitioner's claim of an anomaly, but it destroys his argument that Congress intended the mandatory minimum penalties of Section 1002 to be postponed until November 1, 1987. The corrective statute was necessary because, and only because, Congress recognized that the mandatory minimum penalties had gone into effect as of October 27, 1986, and that the offsetting provision for reductions of sentence below the mandatory minimums should be made effective for the year preceding the effective date of the guidelines.

Finally, petitioner's argument that the whole of Section 1002 did not become effective until November 1, 1987, would have implications beyond the operation of that specific section. Section 1102 of the 1986 Act created a new offense of employing or using persons under 18 years of age in drug operations. See 20 U.S.C. 845b (Supp. IV 1986). Like Section 1002, the new provision required a mandatory minimum term of imprisonment for high-volume offenses, and it made parole inapplicable to persons convicted of that offense. The logic of petitioner's

[3] Petitioner suggests (Br. 27 n.17) that this provision was rendered ineffective because the Sentencing Act of 1987 contained a section establishing the "general effective date" of that statute, which provided that it would apply "with respect to offenses committed after the enactment of this Act." Pub. L. No. 100-182, § 26, 101 Stat. 1272 (1987). By its terms, however, Section 24 is not governed by that "general" effective date, because Section 24 expressly applies to "an offense committed before the taking effect of [the sentencing] guidelines"; the Sentencing Act of 1987 was enacted on December 7, 1987, after the guidelines took effect.

argument would require that the effective date of Section 845b also be postponed until November 1, 1987, even though there is not a shred of evidence that Congress intended that section to lie fallow for a year.[4]

B. The Post-Confinement Monitoring Provisions Of The 1986 Act Became Effective On October 27, 1986

Petitioner's principal contention (Br. 28-49) is that even if the fine and imprisonment provisions of Section 1002 were intended to go into effect immediately, Congress intended to delay the effective date of the post-confinement monitoring provisions of Section 1002 until November 1, 1987. Thus, because prior to the effective date of Section 1002 the controlled substances statutes contained no provision for post-confinement monitoring for the category of large-scale drug offenses that was created in 1984, petitioner argues that he may not be sentenced to either special parole or supervised release.

[4] Petitioner notes (Br. 28) that the no-parole sentences provided by Section 1002 of the 1986 Act are like the sentences contemplated by the 1984 Act, which prospectively eliminated parole. He suggests that this similarity shows that Congress intended the 1986 penalty provisions to be effective at the same time as the new federal sentencing system. But if Congress had intended the 1986 penalty provisions to take effect only as of November 1, 1987, it would have been unnecessary to state that parole was unavailable for the 1986 sentences of incarceration, since the 1984 Act eliminated parole altogether; that is, because every sentence imposed for conduct committed after November 1, 1987, is a no-parole sentence, the no-parole language in Section 1002 would be surplusage if Section 1002 did not go into effect until that date. The same point applies, of course, to section 1102 of the 1986 Act (21 U.S.C. 845b), which expressly bars the application of the parole laws to the offense created by that section. The "no parole" provision in Section 1102 makes it clear that Congress contemplated that it would become effective before the November 1, 1987 effective date of the new federal sentencing system.

Contrary to petitioner's contention, it is clear from the text, the structure, and the background of the 1986 Act that Congress wanted all the penalty provisions in Section 1002 to go into effect at the same time. First, the new penalty provisions were all enacted together as part of Section 1002. We showed in Part A that Section 1002 went into effect on the date of its enactment, October 27, 1986. It is a very small step to the further conclusion that *all* of Section 1002, including the supervised release provisions, went into effect at that time. No provision of the statute postponed the effective date of the supervised release provisions, and it would be inconsistent with the approach used in other parts of the 1986 Act for different ingredients of the penalty provisions of Section 1002 to become effective at different times.[5]

Second, the structure of the new penalty provisions indicates that Congress wanted all three penalty features to go into effect together. The new penalties—imprisonment, fines, and supervised release—were grouped together in a single paragraph for each of the new offense levels in Section 841(b)(1). The package of penalties for each offense level was thus obviously intended to operate as an integrated whole. It is difficult to imagine that Congress could have wanted the third part of the new three-part penalty scheme to be postponed for a year while the first two—imprisonment and fines—went into effect immediately.

Finally, the drafting history of the 1986 Act confirms that Congress intended the post-confinement monitoring provisions for large-scale drug offenses to become effectively immediately upon enactment. Both the House and

[5] Every provision of the 1986 Act that expressly postponed the effective date of some part of the Act operated on a discrete section or subsection. See Sections 1004(b), 1006(a)(4), 1007(b), and 1009(b).

Senate versions of the bill that became the 1986 Act contained the basic features of the statute as ultimately enacted, including the offense classification scheme and the requirements for mandatory minimum terms of imprisonment with no parole. The original bills also required that a term of "special parole" be imposed as part of the package of penalties under each subsection of Section 841(b). See H.R. 5484, 99th Cong., 2d Sess. (1986); S. 2878, 99th Cong., 2d Sess.(1986). Under both bills, the new penalty provisions were to become effective immediately and to apply until the effective date of the new federal sentencing system, November 1, 1987. The House bill provided for special parole to be repealed as of that date, while the Senate bill provided that at that time all references to special parole were to be changed to supervised release. See H.R. Rep. No. 845, 99th Cong., 2d Sess. 20 (1986); 132 Cong. Rec. H6630 (daily ed. Sept. 11, 1986) (§ 608(b) of House bill); 132 Cong. Rec. 26,101 (1986) (§ 1007 of Senate bill).[6] The House concurred in the Senate's version. 132 Cong. Rec. 29,608-29,633 (1986).

Just before final passage of the bill, and without explanation, the words "supervised release" were substituted for the words "special parole" whenever the term "special parole" appeared in Section 1002 and other penalty provisions of the bill. See 132 Cong. Rec. 32,728-32,745 (1986).

[6] The Senate bill was taken from the Administration's proposal, see The Drug-Free America Act of 1986, a Proposal to Congress from the President of the United States, H.R. Doc. No. 266, 99th Cong., 2d Sess. 1-3 (1986). The commentary accompanying the proposal explained that "this amendment in effect transfers special parole into supervised [release] once the Sentencing Reform Act's supervised release provisions go into effect." H.R. Doc. No. 266, *supra*, at 119. That comment makes clear that the post-confinement monitoring provisions were to go into effect immediately, but would change from special parole to supervised release as of November 1, 1987.

That version was enacted by both houses and signed into law on October 27, 1986.[7]

Nothing about the last-minute change suggests that Congress meant for it to delay the effective date of any part of Section 1002 or the other affected provisions. Prior to the change, the bill provided for special parole to serve as the form of post-confinement monitoring until November 1, 1987, when special parole would be replaced by supervised release. The most plausible explanation for the change is that the drafters wanted to accelerate the shift from special parole to supervised release, and to go to a system of supervised release immediately rather than extending special parole for another year. But whatever the reason for the last-minute change, one thing is clear: if Congress had wanted to alter the pending bill by postponing *any* form of post-confinement monitoring until November 1, 1987, it would not have done so by substituting one form of post-confinement monitoring for another in sections of the bill that were to become effective immediately.

In support of the his argument, petitioner invokes (Br. 14-19) Section 1004 of the 1986 Act. That Section went into effect on November 1, 1987, and amended the controlled substances statutes by substituting "term of supervised release" for "special parole term" wherever the latter

[7] The last-minute change in terminology from "special parole" to "supervised release" affected all the provisions being added by the new bill, but it did not affect those penalty provisions of the controlled substances statutes that had called for special parole prior to 1986 and were not amended by the 1986 Act. Thus, supervised release was called for in the following provisions of Title 21: Sections 841(b)(1)(A), 841(b)(1)(B), 841(b)(1)(C), 845a(b), 845b(b), 845b(c), 960(b)(1), 960(b)(2), and 960(b)(3). The following provisions were unaffected by the change in terminology and continued to provide for "special parole" even after the 1986 Act: Sections 841(b)(1)(D), 841(b)(2), 845(a), 845(b), 845a(a), 960(b)(4), and 962(a).

appeared. Petitioner describes Section 1004 as "deal[ing] explicitly with the question of when mandatory supervised release became effective." Pet. Br. 15. That is true for all provisions of the statute that continued to use the term "special parole" as of November 1, 1987. But Section 1004 did not affect provisions of the statute in which the conversion to supervised release had already been made, *i.e.*, those provisions that were converted to supervised release as a result of the last-minute change in the 1986 Act.[8]

As we explained in Part A above, Section 1002 and the other penalty provisions of the 1986 Act went into effect immediately upon enactment. For that reason, Section 1004 did not affect those provisions at all. The post-confinement monitoring scheme established by those provisions of the 1986 Act is therefore fully applicable to petitioner.[9]

[8] Although petitioner concedes (Br. 16) that Section 1004 "does not literally apply to this petitioner's case," he offers an interpretation of Section 1004 that would avoid the inconvenience of an immediately effective Section 1002. He submits, albeit somewhat tentatively (Br. 16-17), that Section 1004 was meant to substitute supervised release for special parole where the latter term appeared in the controlled substances statutes as of 1984, not where it appeared as of November 1, 1987.

That argument is inventive, but it does not work. Section 1004 states only that the substitution of one term for another in the controlled substances statutes will take place on November 1, 1987. It says nothing about which version of the law will be in effect on that day.

[9] Petitioner argues (Br. 21) that the effective date of all provisions of the 1986 Act calling for supervised release must be delayed because offenders sentenced under one such provision, Section 845a(a), were eligible for ordinary parole, and Congress could not have intended offenders to serve terms of parole and supervised release under the same provision. Yet parole and supervised release are not irreconcilable.

C. Petitioner Was Subject To A Mandatory Term Of Supervised Release Rather Than Special Parole

Even if we are correct that Congress intended some form of post-confinement monitoring to go into effect as of October 27, 1986, it could still be argued (although petitioner does not so argue) that the form of post-confinement monitoring that should apply during the one-year interim period is special parole rather than supervised release. If that argument were accepted, it would resolve many of the statutory anomalies created by applying Section 1002 of the 1986 Act according to its terms. And since special parole and supervised release are so similar, construing the statute in that way would not defeat Congress's purpose of ensuring that some form of post-confinement monitoring would be applicable to persons committing

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Prior to 1987, when certain prison sentences under Section 841(b) were still subject to parole, it was not unusual for an offender to serve part of a term of incarceration in prison and part on parole, to be followed by a term of special parole. By analogy, there is no reason why an offender who completes a term of "ordinary" parole cannot then serve a term of supervised release.

Petitioner also notes (Br. 21-22) that in technical amendments enacted on November 10, 1986, Congress corrected a typographical error in a preexisting section, 21 U.S.C. 845a(b) (Supp. II 1984); the amendment substituted the words "special parole term" for the words "special term." However, the words "special term" had already been changed to read "supervised release" by Section 1866(b) of the October 27, 1986, Act, thus superseding the statute that the technical amendment purported to correct. The best explanation for this sequence is simple oversight—a failure to recognize that Congress had already repealed the statute that the technical amendment was designed to repair. That minor error does not in any way evince a congressional intent to delay all the supervised release sentences provided for in the 1986 Act.

crimes after October 27, 1986. In fact, there is only one real problem with that construction of the statute, but it is an imposing one: the language of the statute, which unambiguously refers to supervised release, is squarely to the contrary.

The drafters who made the last-minute switch from special parole to supervised release in the 1986 Act apparently failed to recognize the need to make a variety of corresponding changes in provisions of the underlying statute that were not amended by the 1986 Act. Congress's failure to make those corresponding changes led to the statutory anomalies that we discuss below and to which petitioner devotes much of his brief. But Congress's lack of attention to the collateral effects of the change from special parole to supervised release does not justify judicial disregard of the change itself. The anomalies indicate, of course, that the statute does not function as smoothly as it might. But inefficiency does not confer upon the courts a license to legislate. As this Court has held time and again, it is the duty of the courts to apply the statute as written, even if it would have been more sensible for Congress to have drafted the statute differently. See *Commissioner* v. *Asphalt Products Co.*, 482 U.S. 117, 121 (1987) ("Judicial perception that a particular result would be unreasonable may enter into the construction of ambiguous provisions, but cannot justify disregard of what Congress has plainly and intentionally provided."); *Busic* v. *United States*, 446 U.S. 398, 404-405 (1980) ("to the extent that cases can be hypothesized in which [the Court's holding] may support curious or seemingly unreasonable comparative sentences, it suffices to say that the asserted unreasonableness flows not from [the Court's decisions], but rather from the statutes as Congress wrote them");

Bifulco v. *United States*, 447 U.S. 381, 401 (1980) (Burger, C.J., concurring) ("Our compass is not to read a statute to reach what we perceive—or even what we think a reasonable person should perceive—is a 'sensible result'; Congress must be taken at its word unless we are to assume the role of statute revisers"); see also *TVA* v. *Hill*, 437 U.S. 153, 173 (1978).

Petitioner argues (Br. 40-44) that the district court may not impose a sentence of supervised release for offenses committed prior to November 1, 1987, because Section 3583 of Title 18, which sets forth guidelines for imposing and revoking supervised release, did not go into effect until that date. See Sentencing Reform Act of 1984, Pub. L. No. 98-473, Tit. II, § 212, 98 Stat. 1999. But the premise of petitioner's argument is wrong: the "general power of judges to impose supervised release" (Br. 42) on offenders such as petitioner does not arise from Section 3583. In Section 1002 of the 1986 Act, which amended Section 841(b) of Title 21, Congress explicitly granted sentencing courts authority to impose post-confinement monitoring in the form of supervised release. Thus, the source of the district court's sentencing authority in petitioner's case is 21 U.S.C. 841(b), not 18 U.S.C. 3583. The effective date of Section 3583 therefore does not control the availability of supervised release with respect to offenses governed by the penalty provisions of Section 841(b).

Section 3583 sets forth the conditions that a court must include in an order providing for supervised release (Section 3583(d)), and it governs when an order of supervised release may be revoked or its conditions modified (Section 3583(e)). Petitioner suggests that supervised release could not be imposed before Section 3583 went into effect. That is not true. While it may have been more symmetrical for

all the supervised release provisions to go into effect at the same time, the supervised release provisions of Section 1002 functioned as intended during the period between October 27, 1986, and November 1, 1987, even though Section 3583 was not in effect during that time.

The only consequence of the delay in the effective date of Section 3583 is that, in imposing supervised release prior to November 1, 1987, courts were not strictly bound by the conditions set forth in Section 3583. Nonetheless, the enacted but as yet inchoate Section 3583 gave clear direction to the courts as to the conditions Congress believed to be appropriate for supervisory release orders, and we are unaware of any case in which a district court departed from those terms simply because the court theoretically had authority to do so. The situation is no different than if Congress had chosen not to enact Section 3583 at all, but instead had simply indicated informally and in a nonbinding fashion how it expected the courts to administer the new form of post-confinement monitoring.

Petitioner argues (Br. 22-23) that supervised release imposed for offenses committed prior to November 1, 1987, could not be revoked, because the revocation provision of Section 3583 was not in effect at that time. Because Congress could not have intended to create a remedy with no means to enforce it, petitioner argues, the unavailability of revocation for offenses committed prior to November 1, 1987, is another reason not to construe the Act to provide for supervised release during that period.

There are two responses to that argument. First, as a practical matter, the delay in the effective date of the revocation provision of Section 3583 is unlikely to have affected any cases. To be eligible for supervised release under the 1986 Act, a defendant would have to commit his crime after October 27, 1986. By the time such a defendant was arrested and convicted, served a term of imprison-

ment, violated his supervised release, and was re-arrested for that violation, the revocation provision of Section 3583 would almost certainly have become effective. We are aware of no case in which this problem has arisen.[10]

Second, even if revocation was unavailable for crimes committed prior to November 1, 1987, that does not mean that supervised release orders entered in such cases were toothless. A violation of a supervised release order, like a violation of any other order that a court is authorized to enter, could be punished as a contempt of court, see 18 U.S.C. 401(3).[11]

To be sure, one may well question why Congress, having chosen to enact guidelines for imposing and administering supervised release, decided to require offenders to receive sentences of supervised release before those guidelines would go into effect. Most likely, the drafters simply overlooked the delayed effective date of Section 3583 when they made the last-minute change from special parole to supervised release in Section 1002 of the 1986 Act. They also likely overlooked the confusion that the change would produce in the administration of provi-

[10] There is no *ex post facto* problem in applying the revocation provision of Section 3583 to defendants who committed crimes prior to November 1, 1987, since at the time of the crime, those defendants had notice that they would be subject to the revocation procedures set forth in Section 3583 if their supervised release terms were revoked after November 1, 1987.

[11] Coincidentially, contempt of court was the remedy specified in the 1984 version of Section 3583 for violations of supervised release orders. Although the contempt of court sanction was replaced by a system of revocation when Section 3583 was amended in 1986, even before it came into effect, Congress's prospective choice of contempt of court as a remedy indicates that there would be nothing anomalous about relying on that remedy to enforce orders of supervised release when no other statutory remedy is provided.

sions that imposed one form of post-confinement monitoring by cross-reference to provisions that prescribed a different form of post-confinement monitoring.[12] However, the fact that the oversight has created awkwardness in applying a few of the Act's other penalty provisions is insufficient to overcome the unequivocal requirement of the statute that a defendant in petitioner's position serve a mandatory term of supervised release.

[12] The cross-references to Section 841(b)(1) that are found in Sections 845, 845a, and 845b create the problem. Prior to November 1, 1987, Sections 845 and 845a(a) imposed special parole terms that were multiples of the special parole terms authorized by Section 841(b) for the same type and quantity of drug. Section 845a(b) and 845b imposed supervised release terms that were multiples of the supervised release terms authorized by Section 841(b)(1) for the same type and quantity of drug. That system works fine when the offense of conviction and the pertinent subsection of Section 841(b)(1) prescribe the same form of post-confinement monitoring, but it does not work when the two prescribe different forms of post-confinement monitoring. Thus, for example, for crimes committed before November 1, 1987, a first offense of distributing a kilogram or more of heroin within 1000 feet of a school (21 U.S.C. 845a(a) (Supp. IV 1986)) called for "at least twice any special parole term authorized by Section 841(b)," but the corresponding provision of Section 841(b) (21 U.S.C. 841(b)(1)(A) (Supp. IV 1986)) called for a term of supervised release, not special parole. That statutory mismatch and the other similar mismatches created by the cross-reference provisions in Sections 845, 845a, and 845b are obviously just drafting errors; because it would be "demonstrably at odds with the intention of [the] drafters" to impose no post-confinement monitoring in those cases, see *Griffin* v. *Oceanic Contractors, Inc.*, 458 U.S. 564, 571 (1982), those cross-reference problems, when they arise, should be solved by reading the subsection containing the cross-reference as if it imposed the same form of post-confinement monitoring as the crime of conviction. It is not necessary to address that question in this case, however, since petitioner was not convicted of a crime involving any of the mismatched cross-references.

Finally, petitioner argues (Br. 44-49) that failing all else, he should prevail because of the rule of lenity. But as this Court observed, the rule of lenity "only serves as an aid for resolving an ambiguity; it is not to be used to beget one. * * * The rule comes into operation at the end of the process of construing what Congress has expressed, not at the beginning as an overriding consideration of being lenient to wrongdoers." *Callanan* v. *United States*, 364 U.S. 587, 596 (1961). Because Congress spoke plainly in Section 1002, there is no ambiguity in this case for the rule of lenity to resolve. See *United States* v. *Turkette*, 452 U.S. 576, 587-588 n.10 (1981); *United States* v. *Batchelder*, 442 U.S. 114, 121 (1979); *Scarborough* v. *United States*, 431 U.S. 563, 577 (1977). The fact that the last-minute change from special parole to supervised release may have been careless does not mean that the change rendered the statute ambiguous.

The rule of lenity does not help petitioner for another reason. As we have argued above, it is quite clear that Congress intended some form of post-confinement monitoring to be available for persons in petitioner's position immediately upon the enactment of the 1986 Act. Therefore, the only question as to which there can be a serious claim of ambiguity is which form of post-confinement monitoring is applicable. As petitioner concedes (Br. 30), it is not clear whether special parole or supervised release is more "lenient"; the rule of lenity would therefore be difficult to apply in this setting in any event. But petitioner is not asking for the rule of lenity to be used to determine which of the two competing forms of post-confinement monitoring should be applicable to him. He is making the very different, and much bolder, claim that the rule of lenity should be applied to free him from any post-confinement monitoring at all. His boldness should not be rewarded. The language, history, and purpose of the

statute unambiguously establish that Congress intended a defendant like petitioner to be subject to some form of post-confinement monitoring; in consequence, the rule of lenity cannot properly be invoked to frustrate that decision.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

KENNETH W. STARR
Solicitor General
ROBERT S. MUELLER, III
Acting Assistant Attorney General
WILLIAM C. BRYSON
Deputy Solicitor General
AMY L. WAX
Assistant to the Solicitor General
RICHARD A. FRIEDMAN
Attorney

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